UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: Merrill Lynch & Co., Inc. Research Reports Securities Litigation	Master File No. 02 MDL 1484
This Document Relates to: *In re: Merrill Lynch & Co., Inc. Global Technology Fund Securities Litigation*, 02-CV-7854 (MP)	ON MOTION TO ALTER JUDGMENT AND AMEND COMPLAINT

POLLACK, Senior District Judge.

DECISION AND ORDER

Plaintiff seeks leave to alter this Court's Decision and Order of July 2, 2003, and to further amend her amended complaint. Among other things, her proposed amended complaint would withdraw claims against the independent director defendants. An independent board is free to act in the interests of the Fund's shareholders. Plaintiff's decision nonetheless to proceed with a class claim, when she has not sustained any injury distinct from that allegedly inflicted upon the Fund,[1] departs from the Maryland requirement that such claims may be asserted derivatively only. See Strougo v. Bassini, 282 F. 3d 162 (2d Cir. 2002) ("[U]nder Maryland law . . . [w]hen the corporation is injured and the injury to its shareholders derives from that injury . . . only the corporation may bring suit . . . . The shareholder may, at most, sue derivatively."); Goodman v. Poland, 395 F. Supp. 660, 687 (D. Md. 1975) ("it is well established in Maryland that a stockholder cannot sue individually to recover damages for injuries to the corporation, even though the directors may have entered into an unlawful conspiracy for the specific purpose of ruining the corporation"); Indurated Concrete Corp. v. Abbott, 74 A.2d 17, 22 (Md. 1950);

[1] Loss of investment value is, in the first instance, a loss to the corporation that affects shareholders only indirectly. See Dueren v. Credit Suisse First Boston Corp., No. 02 CV 3921(JSM), 2003 WL 21767509, at *3 (S.D.N.Y. July 31, 2003) (citing Manson v. Stacescu, 11 F. 3d 1127, 1131-1132 (2d Cir. 1993)).

Waller v. Waller, 49 A.2d 449, 452 (Md. 1946); see also Rathborne v. Rathborne, 683 F. 2d 914, 919 n.16 (5th Cir. 1982) ("where a corporation has been defrauded in a securities transaction, a shareholder does not have standing to bring a direct action under Rule 10b-5"); Dueren v. Credit Suisse First Boston Corp., No. 02 CV 3921(JSM), 2003 WL 21767509, at *3 (S.D.N.Y. July 31, 2003) ("Loss of investment value resulting from breach of a duty owed to a corporation does not give rise to a direct cause of action by the corporation's shareholders."); VIII Louis Loss & Joel Seligman, Securities Regulation 3704 (3d ed. 1991).

If Plaintiff had proceeded initially according to Maryland law, there would have been no occasion for a Class suit, for the retention of attorneys for the Class, and for the concomitant and unwarranted expense in pressing Plaintiff's grievances.

Apart from the questionable decision to disregard Maryland law, Plaintiff has not shown any injustice from the decision to dismiss the complaint with prejudice. This Court initially dismissed the Plaintiff's inordinately prolix complaint on specificity grounds and on statute of limitations grounds. There was clearly enough publicly available information to put the plaintiff on inquiry notice of her claims.[2] As noted in this Court's earlier decisions, and set out in more detail in this Court's Order of August 12, 2003, the alleged conflict of interest and inflation of ratings were well documented,[3] and apparently known to Plaintiff. See Original Complaint ¶53 ("sometime during the year 2000, various publications suggested that conflicts of interest were becoming rampant in the broker-dealer industry").

For a further summary of the available public information, see Rod McQueen, The Endangered Species, The Financial Post (Toronto, Canada), **Sept. 9, 1995** (conflicts of interest

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[2] See Dodds v. Cigna Sec., Inc., 12 F.3d 346, 350 (2d Cir. 1993) ("A plaintiff in a federal securities case will be deemed to have discovered fraud for purposes of triggering the statute of limitations when a reasonable investor of ordinary intelligence would have discovered the existence of the [alleged] fraud."); see also In re Merrill Lynch Ltd. Partnerships Litig., 154 F.3d 56, 60 (2d Cir. 1998) ("the question of inquiry notice need not be left to a finder of fact").

[3] "[O]n a motion to dismiss, a court may consider . . . 'matters as to which judicial notice may be taken . . . .'" Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002) (quoting Brass v. American Film Technologies, Inc., 987 F. 2d 142, 150 (2d Cir. 1993)). The Court may take judicial notice of newspaper articles for the fact of their publication without transforming the motion into one for summary judgment. See In re Sterling Foster & Co., Inc. Securities Litigation, 222 F. Supp. 2d 312, 321 (E.D.N.Y. 2002); Schwenk v. Kavanaugh, 4 F. Supp. 2d 116, 118 (N.D.N.Y. 1998).

between underwriting and analysts in brokerage firms were becoming endemic); Roger Lowenstein, Today's Analyst Often Wears Two Hats, The Wall Street Journal, **May 2, 1996** (investment banks "have persuaded clients to hire underwriters on the basis of their analysts' selling power" and that "[i]n turn, the analyst's worth is increasingly dependent on his or her ability to bring in deals" – "investors, journalists and others who deal with the Street would do well to keep in mind that, often times, the analyst is wearing two hats."); Steve Baily & Steven Syre, Taking Analysts' Tempting Forecasts with Grain of Salt, The Boston Globe, **October 23, 1996** (analysts are often over-optimistic about long-term earnings forecasts for equity offerings because "the relationship between the analysts and the investment banking business . . . pays their bills." – mounting evidence suggests that you "trust [analysts] at your peril."); John R. Dorfman, All-Star Analysts 1997 Survey, The Wall Street Journal, **June 19, 1997** ("Analysts earn that pay in lots of ways, some of which have little or nothing to do with picking stocks or accurately estimating corporate earnings. For example, at many firms, analysts are expected to bring in investment-banking deals"); John Hechinger, Heard in New England: Analysts May Hate to Say 'Sell,' But a Few Companies Do Hear It, The Wall Street Journal, **Apr. 8, 1998** (cautious investors would be "hard-pressed to scare up a bearish research report telling them which shares to dump." Of 2,066 ratings, 68% were "buys" or "strong buys," 31% were holds and less than 1% were "weak sells" or "strong sells." – Analysts often won't issue a "sell" because they "don't like to anger companies that could be their firm's investment-banking clients."); Jeffrey Laderman, Who Can You Trust?, Business Week, **Oct. 5, 1998** ("brokerage firms are not about to break up the money machine that pairs analysts with dealmakers. And analysts are not about to risk offending the companies they cover. Woe to the investor who doesn't keep these two ideas in mind before investing on a stock recommendation."); Jon Birger, New Executive Henry Blodget, Crain's New York Business, **Mar. 22, 1999** ("Initial public offerings have become huge moneymakers for investment banks, and firms frequently select their underwriters based upon the reputation of the analyst who covers their industry."); Frog Spawn, The Economist, **Apr. 17, 1999** (Sell is a four-letter word); SEC Chairman Aurthur Levitt, Address at the Investors' Town Meeting, Albuquerque, New Mexico, **Nov. 20, 1999** ("analysts' paychecks are typically tied to the performance of their employers. You can imagine how unpopular an analyst would be who downgrades his firm's best client. Is it any wonder that today, a 'sell' recommendation from an analyst is as common as a Barbara Streisand concert?"); Erick Schonfeld, The High Price of Research, Fortune, **Mar. 20, 2000** ("Analysts of all stripes . . . increasingly derive a portion of their compensation, directly or indirectly, from the companies they cover."); David Streitfeld, Analyst With a Knack, The Washington Post, **Apr. 2, 2000** ("'Any analyst whose firm does major investment banking work – and nearly all of them do – is suspect. I don't know why the SEC doesn't ask these firms to spin off their research operations.'") (quoting Jeffrey Hooke, author of Security Analysis on Wall Street); Robert Samuelson, A High-Tech Accounting?, Newsweek, **Apr. 3, 2000** ("'The conflicts of interest are immense . . . .' Stock analysts are increasingly 'cheerleaders' [whose] pay depends on the firm's underwriting, which depends on enthusiastic research reports") (quoting Professor Jay Ritter); Eileen Buckley, Holding Analysts Accountable, The Industry Standard, **June 12, 2000** ("Research analysts writing recommendations of closely watched Internet stocks routinely face conflicts of interest.").

This Court cites these articles to show that the alleged conflicts of interest and inflation of ratings were sufficiently known to the public early enough for the statute of limitations to bar claims that such conflicts or inflation formed the basis of a fraud. The Court in no way suggests that a fraud occurred, and Merrill Lynch has at no time admitted that its course of business operated as a fraud within the purview of the PSLRA or the Securities Laws, or was intended to injure investors, or that prices of shares had been artificially inflated by their analysts.

Plaintiff's allusion to <u>Newman v. Warnaco Group, Inc.</u>, 335 F. 3d 187 (2d Cir. 2003), to rebut this Court's statute of limitations analysis is unavailing. Unlike in <u>Newman</u>, Merrill Lynch did not give a contemporaneous, benign explanation for the myriad news articles that served to put plaintiff on inquiry notice. The only "explanation" recited by Plaintiff is that in the proposed complaint at ¶ 296 – a statement that Merrill Lynch precludes analysts from seeking approval from corporate clients or investment bankers before changing a recommendation. This statement was issued in October of 2001, a full year after the last of the news articles cited above and five years after the first. It is clearly not contemporaneous with the articles, or substantively sufficient to make it reasonable for plaintiffs not to inquire into the questions raised by such articles.[4]

As for the pleading deficiencies that served as a basis for dismissal, this Court early recognized the problems with the Plaintiff's original complaint and gave Plaintiff a wide-open chance to make amendments before dismissal. While it is true that this is plaintiff's first sponsored request for leave to amend, it is her second opportunity to properly frame and assert her complaint. Case Management Order No. 3 in this action specifically directed and warned plaintiffs in these consolidated cases to file consolidated amended complaints that:

> will comply with the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure and the PSLRA, in particular 15 U.S.C. § 78u–4(b)(1) & (2). The factual allegations must be specific to the security in question and should clearly allege who said what to whom concerning that particular security. Consolidated amended complaints should also be carefully framed in order that they may fully comply with all applicable law regarding the pleading of loss causation.

The Decision and Order of this Court of July 2, 2003 held that plaintiff had ignored and failed to satisfy the requirements of Rule 9(b) and the PSLRA because she ignored and failed to plead the critical applicable elements of loss causation in the face of the bursting of the internet bubble, ignored and failed to plead her complaint with particularity, ignored and failed to adequately plead scienter, and ignored and failed to plead a duty to disclose the requisite publicly available information. Plaintiff's proposed amended complaint does not show that the information cited herein was not publicly available, offset the burst of the internet bubble which intervened between the purchase and subsequent holding of the stock which occasioned her losses, cure the other pleading deficiencies found in her complaint, or satisfy the statute of limitations. Thus, Plaintiff's proposed amended complaint cannot itself survive a motion for dismissal. See In re American Exp. Co. Shareholder Litig., 39 F.3d 395, 402 (2d Cir. 1994) ("leave to amend may be denied if the amendment would be futile"); see also Emergent Capital Inv. Management, LLC v. Stonepath Group, Inc., 195 F. Supp. 2d 551, 563 n.4 (S.D.N.Y. 2002) (where plaintiff was given the opportunity to amend its complaint and submitted substantially the

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[4] It is also unclear whether the Warnaco court would have found that a denial of wrongdoing would have the same effect on plaintiffs as a detailed and benign explanation.

same complaint, the Court found no need to grant subsequent motion to submit yet another non-viable complaint).

Plaintiff's attempt to shift the focus of her complaint to IPO manipulation will not save it from dismissal. It is a mere restatement of her prior allegations that Merrill Lynch manipulated the price of securities purchased by the Fund, causing the Fund to overpay for such securities. Plaintiff does not plead this scenario, as it relates to the Fund, with the particularity necessary to survive dismissal, nor does it cure the pleading deficiencies found in any of her complaints.

Moreover, Plaintiff's proposed second consolidated amended complaint is 112 pages long, contains 424 paragraphs, and is in clear violation of Federal Rule of Civil Procedure 8(a), which mandates that pleadings shall consist of a "short and plain statement of the claim showing that the pleader is entitled to relief." An unquestionably simple complaint uttered in so many pages borders very substantially on what Congress intended to eliminate under the Private Securities Litigation Reform Act's heading of "abusive litigation."

The motion to alter the judgment is denied. The motion to amend the complaint is denied.

SO ORDERED.

Dated: August 19, 2003

MILTON POLLACK
Senior United States District Judge